A

Jordan Saw Yu Huan v Low Suan Chuan & Ors

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HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-684 OF 2011
PRASAD ABRAHAM J
6 DECEMBER 2012

C

Tort — Negligence — Fire — Accident at work — Motorsports racing — Plaintiff /victim stationed as tyre changer — Fire broke out in pit stop when racer wished to refuel — Victim suffered fairly serious burns to body — Whether organisers negligent — Claim for general and specific damages — Whether doctrine of volenti non fit injuria and res ipsa loquitur could be raised

D

Damages (Personal Injury or Death) — General damages — Pain and suffering — Fire — Accident at work — Motorsport racing — Victim suffured fairly serious burns to body — Whether claim allowed

E

Damages (Personal Injury or Death) — Special damages — Medical expenses — Fire — Accident at work — Motorsport racing — Victim suffured fairly serious burns to body — Whether awarded

F

Tort — Negligence — Joint torfeasors — Liabilities of parties involved

G

Tort — Negligence — Duty of care — Motorsport racing — Plaintiff/victim stationed as tyre changer — Suffered fairly serious burns to body — Whether organisers negligent — Whether duty owed to workmen

H

As a student undergoing an automotive course, the plaintiff regularly trained as a mechanic and pit crew member at local motor racing events. The first defendant was a director and shareholder of a motorsports company ('the third defendant') while the second defendant was a director and shareholder of Team Empire Motorsports Sdn Bhd ('the second defendant's company'), which was in the business of promoting and participating in motorsports racing. The fourth defendant was the owner of the Sepang International Circuit ('Sepang Circuit') and the fifth defendant was the sole national motor sports body under the Federation Internationale de 1'Automobile ('FIA') to control automobile competitions throughout Malaysia. The plaintiff had participated in the Merdeka Millenium Endurance Race ('MMER') as a crew member under the second defendant's team. The fourth defendant had obtained an organising

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permit from the fifth defendant who then conducted a circuit inspection on the Sepang Circuit and submitted an inspection report concluding that the circuit was in excellent condition. On the day of the event, the racing car of Team AEM entered into its pit for refueling. A fire broke out in the pit and the plaintiff, who was stationed as a tyre changer, suffered fairly serious burns to his body, the effects of which the plaintiff suffers till today. The plaintiff filed the present suit against the defendants for negligence, claiming for general and specific damages and raising the issues of, inter alia, *volenti non fit injuria* and *res ipsa loquitur*.

Held, allowing the claim in part:

(1) The claims against the first and second defendants were dismissed with costs. There could not be a special relationship between the first and second defendants where they have assumed responsibility voluntary or deemed and no duty of care arose to the plaintiff (see para 30).

(2) The third defendant was in collaboration with the second defendant's company in the MMER race and the third defendant owed a duty of care to the plaintiff together with second defendant's company. If both these companies had not entered AEM as a team for the MMER Race, the plaintiff would not have been recruited as a crew member and would not have suffered the injuries he did (see paras 31 & 33).

(3) The third defendant breached its duty of care in not ensuring that the number of crew members in the pit area should have been limited when the racing car made a pit stop for refueling, then. Evidence via a video showed that the pit was a rather confined area, which was packed with people, and no attention was paid to the presence of the plaintiff there, despite it being a pit stop for refueling and not tyre change. While being in the pit area, the plaintiff was not provided with a fire resistant suit. Neither the third nor the second defendant took any steps to exclude the plaintiff from the pit area when refueling was taking place, bearing in mind the high risks involved (see para 33).

(4) The fourth defendant had breached its duty of care that it owed to the plaintiff as an invitee. Based on the evidence of a video, the presence of fire marshalls was conspicuously absent. When the fire broke out, there was pandemonium causing the plaintiff to be hurt. Further, if the race stewarts had been diligent they should have prevented the plaintiff from being present in the pit area without a fire resistant suit and the plaintiff should have been ejected from the pit. The injuries suffered by the plaintiff were foreseeable and the fourth defendant failed to exercise a proportionate degree of care to avoid injuries to the plaintiff. The probability of the plaintiff suffering burns in the event of a fire breaking out in the pit was real and lack of precautionary measures to prevent the same renders the plaintiff's claim actionable (see paras 37–38).

(5) The fifth defendant owed a duty of care to the plaintiff to ensure the MMER race were safe to be run before a license is issued for the running of the race. The fifth defendant had done all that was required of them to ensure a safe race track. The evidence showed that the representative of the fifth defendant had inspected the track and in fact an official of FIA had also inspected the track and evaluated the safety of the same (see para 40).

(6) With regards to the doctrine of *volenti non fit injuria*, there was no evidence that the plaintiff had willingly consented to accepting the danger and/or risks involved by being present in the pit. Consent must be real and given without force. The plaintiff might have had knowledge of the risk but that did not amount to consent. The court found that the doctrine of *res ipsa loquitor* had no bearing in this case and rejected the same (see paras 41–42).

(7) The liability of damages was apportioned in the ratio of 40% to the fourth defendant and 60% to the third defendant. The plaintiff was awarded RM175,000 in general damages and RM47,398 in special damages (see para 52).

[Bahasa Malaysia summary

Sebagai seorang pelajar yang menjalani kursus automotif, plaintif biasanya dilatih sebagai mekanik dan ahli krew pit di acara kereta lumba tempatan. Defendan pertama adalah pengarah dan pemegang saham syarikat sukan permotoran ('defendan ketiga') manakala defendan kedua adalah pengarah dan pemegang saham Team Empire Motorsports Sdn B ('syarikat defendan kedua'), yang menjalankan perniagaan promosi dan penyertaan dalam perlumbaan sukan permotoran. Defendan keempat adalah pemilik Litar Antarabangsa Sepang ('Litar Sepang') dan defendan kelima adalah satu-satunya badan sukan permotoran negara di bawah Federation Internationale de 1'Automobile ('FIA') untuk mengawal pertandingan automobil di seluruh Malaysia. Plaintif telah menyertai dalam Merdeka Millenium Endurance Race ('MMER') sebagai ahli krew dalam pasukan defendan kedua. Defendan keempat telah mendapat permit penganjuran daripada defendan kelima yang kemudian telah mengadakan pemeriksaan litar di Litar Sepang dan mengemukakan laporan pemeriksaan dengan membuat kesimpulan bahawa litar itu dalam keadaan yang baik. Pada hari acara itu, kereta lumba Team AEM telah memasuki pitnya untuk mengisi semula petrol. Satu kebakaran telah berlaku dalam pit itu dan plaintif, yang telah ditugaskan sebagai orang yang menukar tayar, mengalami kebakaran agak serius pada badannya, kesan kecederaan yang dialami plaintif itu kekal hingga ke hari ini. Plaintif telah memfailkan guaman ini terhadap defendan-defendan kerana kecuaian, menuntut ganti rugi am dan spesifik dan menimbulkan isu-isu, antara lain, *volenti non fit injuria* dan *res ipsa loquitur*.

Diputuskan, membenarkan sebahagian daripada tuntutan:

(1) Tuntutan-tuntutan terhadap defendan-defendan pertama dan kedua

telah ditolak dengan kos. Tidak mungkin ada hubungan istimewa antara defendan-defendan pertama dan kedua di mana mereka mempunyai tanggungjawab secara sukarela atau dianggap begitu dan tiada kewajipan berjaga-jaga yang timbul terhadap plaintif (lihat perenggan 30).

(2) Defendan ketiga bekerjasama dengan syarikat defendan kedua dalam perlumbaan MMER dan defendan ketiga mempunyai kewajipan berjaga-jaga kepada plaintif dengan syarikat defendan kedua. Jika kedua-dua syarikat berikut tidak memasuki AEM sebagai pasukan untuk perlumbaan MMER, plaintif tidak mungkin direkrut sebagai ahli krew dan tidak akan mengalami kecederaan yang dialaminya (lihat perenggan 31 & 33).

(3) Defendan ketiga telah melanggar kewajipan berjaga-jaganya kerana tidak memastikan bilangan ahli krew di dalam kawasan pit patut dihadkan apabila kereta lumba berhenti di tempat pit itu untuk mengisi semula petrol, pada masa itu. Keterangan melalui video menunjukkan bahawa pit itu memang kawasan yang sempit, yang penuh dengan manusia, dan perhatian tidak bertumpu kepada kewujudan plaintif di situ, meskipun ia tempat pit untuk berhenti mengisi semula petrol dan bukan untuk menukar tayar. Walaupun ia kawasan pit, plaintif tidak diberikan pakaian kalis api. Defendan ketiga atau kedua juga tidak mengambil apa-apa langkah untuk mengecualikan plaintif dari kawasan pit itu semasa pengisian semula petrol dilakukan, dengan mengambil kira risiko tinggi yang terlibat (lihat perenggan 33).

(4) Defendan keempat telah melanggar kewajipan berjaga-jaganya terhadap plaintif sebagai orang yang dijemput. Berdasarkan bukti dalam video, adalah nyata tidak ada kehadiran marshal kebakaran di situ. Apabila kebakaran berlaku, keadaan menjadi hiruk-pikuk sehingga menyebabkan plaintif cedera. Selanjutnya, jika pengelola perlumbaan bersikap teliti mereka patut menghalang plaintif daripada berada di kawasan pit tanpa pakaian kalis api dan plaintif patut dikeluarkan daripada pit itu. Kecederaan yang dialami oleh plaintif boleh dijangka berlaku dan defendan keempat telah gagal melaksanakan tahap keselamatan berpatutan bagi mengelak kecederaan terhadap plaintif. Kebarangkalian plaintif mengalami kecederaan akibat kebakaran jika berlaku kebakaran di pit itu benar-benar berlaku dan akibat daripada tiada langkah-langkah berjaga-jaga bagi mengelak perkara itu dan ini menyebabkan tuntutan plaintif boleh dituntut (lihat perenggan 37–38).

(5) Defendan kelima mempunyai kewajipan berjaga-jaga terhadap plaintif bagi memastikan perlumbaan MMER adalah selamat untuk dijalankan sebelum lesen dikeluarkan untuk mengadakan perlumbaan itu. Defendan kelima telah melakukan semua yang dikehendaki oleh mereka bagi memastikan trek perlumbaan adalah selamat. Keterangan menunjukkan bahawa wakil defendan kelima telah memeriksa trek

tersebut dan pegawai FIA juga telah memeriksa trek tersebut dan menilai keselamatannya (lihat perenggan 40).

(6) Berdasarkan doktrin *volenti non fit injuria*, tiada keterangan yang plaintif dengan sukarela bersetuju menerima bahaya dan/atau risiko yang terlibat dengan berada dalam pit itu. Persetujuan perlu yang sebenar dan diberikan tanpa paksaan. Plaintif mungkin mempunyai pengetahuan tentang risiko itu tetapi ini tidak membentuk persetujuan. Mahkamah mendapati bahawa doktrin *volenti non fit injuria* tidak terpakai dalam kes ini dan menolak yang sama (lihat perenggan 41–42).

(7) Liabiliti ganti rugi dibahagikan pada kadar 40% kepada defendan keempat dan 60% kepada defendan ketiga. Plaintif telah diawardkan RM175,000 untuk ganti rugi am dan RM47,398 untuk ganti rugi khas (lihat perenggan 52).]

Notes

For cases on fire, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1258–1271.

For cases on joint tort feasors, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1294–1295.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1157–1226.

For cases on medical expenses, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2027–2028.

Cases referred to

Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor [1995] 4 MLJ 182, HC (folld)

Aikbee Sawmill Ltd v Mun Kum Chow [1971] 1 MLJ 81, FC (refd)

Caparo Industries plc v Dickman [1990] 1 All ER 568, HL (folld)

Foong Nan v Sagadevan [1971] 2 MLJ 24, FC (refd)

Hamzah D494 & Ors v Wan Hanafi bin Wan Ali [1975] 1 MLJ 203, FC (refd)

Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors [1984] 1 MLJ 283, FC (refd)

Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors [1981] 2 MLJ 27, FC (refd)

Moo Ah Kow v TNB Distrubition Sdn Bhd [2009] MLJU 1451, HC (refd)

Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor [1988] 1 MLJ 19, SC (refd)

Susan Cheah Pik Yee & Ors v Mayban Finance Bhd [2003] 3 MLJ 376, HC (refd)

Takong Tabari v Government of Sarawak & Ors [1996] 5 MLJ 435, HC (refd)

Teoh Guat Looi v Ng Hong Guan reported in [1998] 4 MLJ 525; [1998] 4 AMR 3815, CA (refd)

Trevor Ivory Ltd v Andersons [1992] 2 NZLR 517, CA (refd)

Wattleworth v Goodwood Road Racing Company Ltd and others [2004] All ER (D) 51 (Feb), QBD (refd)

Geok Kenzin (Mohd Noor with him) (Nasir, Kenzin & Tan) for the plaintiff.
CS Soh (Siti Ruhaila with him) (Zailan & Co) for the first and third defendants.
Brendan Siva (Noor Yasmin with him) (Brendan Siva) for the second defendant.
Mohd Khalil Tajuddin (Mohd Fadlyzil with him) (Nazri Azmi Islinda) for the fourth defendant.
G Vijay Kumar (Raphael Kok with him) (Lee Hishammuddin Allen & Gledhill) for the fifth defendant.

Prasad Abraham J:

[1] The plaintiff was at all material times a student undergoing an automotive course at the 'Otomotif College'. The plaintiff obviously developed a passion for motorsport and he regularly trained in his past time as a mechanic and pit crew member. From 2000–2011, the fourth defendant organised an event known as Merdeka Millenium Endurance Race ('MMER'). The second defendant was at all material times a director and shareholder of a company known as Team Empire Motorsports Sdn Bhd who together with the third defendant Alyeso Motorsports Sdn Bhd formed an entity known as Team Aylezo Empire Motorsports ('Team AEM'). The first defendant was a shareholder and director of the third defendant at all material times. It is to be noted that the plaintiff has chosen not to cite Team Empire Motorspots Sdn Bhd as a party.

UNDISPUTED FACTS

[2] The plaintiff was a student undergoing an automotive course at 'The Otomotif College'. In his past time, he regularly trained as a mechanic and pit crew member at local motor racing events in 2009–2010.

[3] The first defendant ('D1') was a director and shareholder of the third defendant ('D3'), a private company in the business of motorsports.

[4] The second defendant ('D2') was a director and shareholder of Team Empire Motorsports Sdn Bhd, a private company (the second defendant's company) in the business of promoting and participating in motorsports racing.

[5] The fourth defendant ('D4') is and was a private limited company which owns and occupies a world-class racing circuit known as 'Sepang International Circuit' ('Sepang Circuit'). Over the years, D4 has organised and hosted

various prestigious international motorsports events at Sepang Circuit, including formula One Grand Prix and MotorGP.

[6] The fifth defendant ('D5'), is and was a registered sports body under the Sports Development Act 1997 and, is the sole national motor sports body under the Federation Internationale de 1'Automobile ('FIA') to control automobile competitions throughout Malaysia.

BACKGROUND OF THE MMER

[7] From 2000–2011, D4 annually organised an event known as 'Merdeka Millenium Endurance Race' (MMER).

[8] During the MMER in 2009, the plaintiff participated as a crew member under D2's team.

[9] In late 2009 and early 2010, D4 sent various documents to D5 in view of applying for an organising permit to organise the MMER in 2010, including, inter alia:

(a) Sporting & Technical Regulations 2010 dated 7 December 2009 ('STR');

(b) Hospital Putrajaya's letter to D4 dated 18 January 2010;

(c) Additional Supplementary Regulations No 1 dated 15 July 2010 ('ASR'); and

(d) circuit plans of Sepang Circuit.

[10] On 24 March 2010, D5's representative, one Paul David, conducted the annual circuit inspection on Sepang Circuit, and submitted an inspection report.

[11] Between 1–4 April 2010, a technical delegate of the FIA, one Charlie Whiting, conducted a circuit inspection on Sepang Circuit for the purpose of verifying that the circuit was suitable and safe to host the F1 that same year and submitted a report concluding that the circuit was in excellent condition.

[12] On the night of 31 July 2010, the said Paul David conducted another inspection on the Sepang Circuit for the purpose of ensuring its facilities and signaling equipment complied with the safety regulations to hold a night race such as the MMER in 2010, and submitted an inspection report.

[13] On 2 August 2010, D5 issued an organising permit to D5 to host the

MMER from 5–8 August 2010 ('MMER 2010'). A

ORGANISATION OF MMER 2010

[14] The MMER 2010 was a 12-hour endurance race held in a closed circuit at Sepang Circuit. Each participating team would have three drivers. Winners are determined by the number of laps covered in 12 hours. B

[15] The race proper started at the stroke of midnight on 8 August 2010. Prior to that, the first three days between 5 August 2010 and 7 August 2010 was scheduled for registration, scrutineering, practice, qualifiers and warm-up. C

[16] Amongst the main officials for MMER 2010 appointed by D4 were Jafri Amin ('DW6'), the clerk of the course and Matshithah bt Hashim ('DW5'), the secretary of the meeting. D

[17] The only officials for MMER 2010 appointed by D5 were the stewards of the meeting ('stewards') ie Allen Oh Siew Sein ('chief steward') ('DW7'), Ahmad Shuhaimi bin Abdullah and Syed Abdul Hamid bin Syed Osman. E

[18] An entrant for MMER 2010 was Team Aylezo Empire Motorsports (Team AEM), whose drivers consisted of D1, D2 and one Denis Lian.

THE FIRE INCIDENT F

[19] At midnight of 8 August 2010, the MMER 2010 race started.

[20] A few hours later, at about 2.30am, the racing car of Team AEM entered into its pit. As the car was being refueled by its crew members, a fire suddenly broke out which engulfed the car and burned a few of its crew members, including the plaintiff, D2 and the chief mechanic, PW5. G

[21] The plaintiff was rescued by unknown persons. He was taken to Hospital Putrajaya by ambulance, and later to Hospital Universiti Kebangsaan Malaysia ('HUKM'), which had a special burns unit. H

[22] Team AEM's race ended after the fire incident.

THE AFTERMATH I

[23] After the race ended, a stewards' meeting was held and attended by the main officials such as the clerk of the course and the stewards.

[24] Each steward, including DW7, submitted a report to D5. Pursuant to D5's request, D4 and Team AEM also submitted their reports to D5 within a month.

[25] From the evidence led, the second defendant as a representative of Team Empire Motorsports Sdn Bhd, had visited the Otomotif College ('TOC') and as the second defendant states in his evidence on behalf of Team Empire Motorsports Sdn Bhd (the second defendant's company), to speak to the students on the MMER Racing Programme, and extoll to the students including the plaintiff of on job training by participating in these MMER races. For students at that age, including the plaintiff, it would not have taken much persuasion to agree to this plea with the lure of the high-speed cars screeching tyres and the pressured environment of motor racing. The plaintiff registered for job training with the second defendant's company as a member of the crew. The plaintiff participated in the 2009 MMER and later as a crew member for MMER 2010, as a crew member for tyre changing.

[26] On the 8 August 2010, around about 2.15am in the morning whilst stationed in the pit area as a tyre changer, a fire broke out in the pit which engulfed the plaintiff amongst others causing the plaintiff to suffer fairly serious burns to plaintiff's body, the effects of which the plaintiff suffers till today. The plaintiff now brings this suit against the defendants for negligence.

THE PLAINTIFF CLAIM AGAINST THE FIRST AND SECOND DEFENDANT

[27] The team that was officially registered to race MMER 2010 as an entrant was Team Aylezo Empire Motors ports (Team AEM) which was a collaboration between the second defendant's company and the third defendant. The entrant according to the evidence was the brand under which the drivers race under but do not reflect the entities in collaboration. The drivers for team AEM were the first, second defendants and one Dennis Lian.

[28] The arrangement as to the division of roles and responsibilities between the second defendant's company and the third defendant company was that the third defendant will be responsible to secure sponsorship and/or financial contribution for the joint team Team Aylezo Empire Motorsports whereas the second defendant's company will provide crew members, equipment as well as provide safety briefings and equipment testing for the Team, (see Q&A 9 and 16 of the plaintiff WSDW1, Q&A 1–3 at p 203 of the notes of proceedings):

(a) the third defendant secured sponsorship of RM20,000 from the Melia Kuala Lumpur for Team Aylezo Empire Motorsports (see p 13 of bundle D1, Q7 of the WSDW1);

(b) in cross-examination, DW3 confirmed that Aylezo Motorsports mainly supported in the financing part of the team and helped to obtain sponsors and also to forward upfront payment for purchases of equipment (see Q&A 7–8 at p 216 of the notes of proceedings);

(c) when cross-examined on this point, DW1 stated 'At that time, the money that I received from Melia was RM20,000.00. The RM20,000.00 go straight to the team, to Empire Motosports, not to Ashraff' (see Q&A 55–65 at pp 193–194 of the notes of proceedings);

(d) the second defendant's crew members and team personnel for Team Aylezo Empire Motorsports. The crew members were, amongst others, Kelvin Yong ('DW3') (team manager), Harwin Singh Sidhu ('DW2') (assistant team manager), Wan Shazreen ('PW5') and Calvin Lim (chief mechanics), Cheah Lai Sun (race engineer), Eline Leong (mechanic/driver's assistant), Alson Wong and Aruna Tharaka (refuellers), Gayan Shalitha Abeysekara and Lam (fire extinguishers), Benjamin Mah (right rear tyre changer) and the plaintiff (right front tyre changer) (see Q&A 24 of WSDW4);

(e) the second defendant's company recruited some of the crewmembers from the Otomotif College ('TOC'), including Harwin Singh, Eline Leong and the plaintiff. During cross-examination, DW4 clearly explained that he did approach the plaintiff through TOC and that he did personally go to the said college. But this was done on behalf of the the second defendant's company (see Q&A 7–9 at pp 231–232, Q&A 31–33 at pp 234–235 of the notes of proceedings);

(f) the second defendant's company purchased safety equipment for the crew members such as durable pants, boots and attire. The invoice was addressed specifically of Team Empire Motorsports Sdn Bhd (see invoice dated 24 August 2009 addressed to Team Empire Motorsports Sdn Bhd at pp 11–12 of bundle E1);

(g) the second defendant's company purchased parts for the racing car (see Q&A 62–63 of WSDW4 and pp 13–17 of bundle E1);

(h) the second defendant's company provided the racing car for MMER 2010. With regards to the registration issue of the car called 'Lotus 2/11' that was used to race in the racing competitions in 2008–2010, the second defendant explained that the car belongs to the second defendant's company. But due to rules and regulations of the Ministry of Finance, and for the documentation and record purposes of the said Ministry and also Motorsports Association Malaysia, that said car had to be registered in the second defendant's name (see Q&A 34–40 at p 234, Q&A 3–4 at p 251 of the notes of proceedings). The fact that the said racing car was provided by Team Empire Motorsports Sdn Bhd is supported by DW3 (see Q&A 33–38 at pp 219–220, Q&A 2–3 at p 226 of the notes of proceedings;

(i) the second defendant's company also rented the third defendant's workshop for about a month for the preparation purposes of Team Aylezo Empire Motorsports ie to work on the race car and to test the equipment. Team empire Motorsports Sdn Bhd paid RM600 per month to the third defendant for the said workshop rental (see Q&A 9 of WSDW1, Q&A 72–75 at pp 195–196 of the notes of proceedings and Q&A 6 at p 204 of the notes of proceedings);

(j) Wan Shazreen ('PW5'), the Chief Mechanic for Team Aylezo Empire Motorsports for MMER 2010, was paid a salary of RM4,000 through two cheques. PW5 admitted in cross-examination that he received cheques from the second defendant's company. The cheques were issued from the bank account of Team Empire Motorsports Sdn Bhd (see pp 7–8 of bundle E3 and Q&A 82–92 at pp 127–128 of the notes of proceedings); and

(k) there are numerous other payments made by Team Empire Motorsports Sdn Bhd, as evidenced by their bank account statements:

(i) payment to Don Kasun (internship allowance for September 2009) (see pp 2–3 of bundle E3);

(ii) payment to Eline Leong (claims) (see pp 4–5 of bundle E3);

(iii) payment to Sam McCoy Manufacturing (purchase of refueling hose) (see pp 6–7 of bundle E3);

(iv) payment to Wan Shazreen (PW5) (50% of contract salary) (see pp 8–9 of bundle E3); and

(v) payment to Kelvin Yong (DW3) (claims) (see pp 10–11 of bundle E3).

THE LIABILITY OF THE FIRST AND SECOND DEFENDANT TO THE PLAINTIFF

[29] In considering this question, the starting point must be to look at the position of the plaintiff in this case as a matter of law. The plaintiff was when the fire broke out an invitee in law as he was a crew member of team AEM.

[30] The question to be determined is whether the first and second defendant owed the plaintiff a duty of care for the plaintiff to suceed in its claim against them. I refer to the particulars of negligence in para 15 of the statement of claim bundle A pp 7–8, in respect of the first, second and third defendant. The first defendant was merely a driver of the team AEM and a director and shareholder of the third defendant. The second defendant when visiting the

college and speaking to the students at the college including the plaintiff, was acting on behalf of the second defendant's company but the second defendant in his personal capacity was a driver of the AEM team. I agree with the submissions of counsel for the second defendant on this point. I find there cannot be a special relationship between the first and the second defendant where the first defendant and second defendant have assumed responsibility voluntary or deemed and no duty of care arises to the plaintiff. I refer to the case of *Trevor Ivory Ltd v Andersons* [1992] 2 NZLR 517, and I quote:

> An officer or servant of a company, no matter his status in the company, might in the course of activities on behalf of the company come under a personal duty to a third party, breach of which might entail personal liability. The test as to whether that liability had been incurred was whether there had been an assumption of a duty of care, actual or imputed. Liability depended on the facts, on the degree of implicit assumption of personal responsibility and the balancing of policy considerations. On the formation of his company, Mr Ivory had made it plain to all the world that limited liability was intended. His object would be undermined by imposing personal liability. There was no just and reasonable policy consideration for imposing an additional duty of care. Mr Ivory was not personally liable.

[31] The same reasoning would apply to the first defendant. It is in my view the second defendant's company and the third defendant that owed a duty of care to the plaintiff. If both these companies had not entered AEM as a team for the MMER Race, the plaintiff would not have been recruited as a crew member and would not have suffered the injuries he did (the but for test).

[32] For the aforesaid reasons, I dismiss the claim against the first and second defendants with costs.

THE PLAINTIFF'S CLAIM AGAINST THE THIRD DEFENDANT

[33] Adopting the proximity test, the third defendant in collaboration with the second defendant's company entered AEM as a team to complete in MMER 10. It is foreseeable that if there was a breach of duty towards the plaintiff as a crewmember, then the plaintiff would suffer injury and damage. The plaintiff has listed various particulars of negligence in its statement of claim against the third defendants but it is my view that (a), (f) and (g) apply. The evidence shows the crew members were briefed especially by Denis Lian one of the drivers. It is my view that the third defendant breached its duty of care in not ensuring that when the racing car made a pit stop for refueling, then the number of crew members in the pit area should have been limited. The video of the incident shows the pit was a rather-confined area, which was packed with people, and no attention was paid to the presence of the plaintiff there, despite it being a pit stop for refueling and not tyre change.

[34] AEM is a collaboration between the third defendant and the second defendant company to race MMER. I have no hesitation in holding that the third defendant was in collaboration with the second defendant company in the MMER race and the third defendant owed a duty of care to the plaintiff together with the second defendant's company. I observe that whilst the plaintiff was in the pit area the plaintiff was not provided with a fire resistant suit neither did the third defendant and/or the second defendant take any steps to exclude the plaintiff from the pit area when refueling was taking place, bearing in mind the high risks involved.

[35] The third defendant might argue, they were only responsible for obtaining sponsorship to enable the car to race in MMER together with the second defendant's company under Team AEM. Having regard to all the relevant considerations in this case the circumstances as a whole are such that is fair just and reasonable for the imposition of a duty of care on the third defendant. Whilst it is clear that the second defendant recruited the plaintiff and operational matters were under the preview of the second defendant's company, the plaintiff presence in the pit area was due to the race entry by Team AEM a collaboration between the third defendant and the second defendant's company, and under those circumstances I imposed a duty of care on the third defendant, leaving the third defendant to take whatever action it deems fit against the second defendant's company. I adopted the approach of the House of Lords in *Caparo Industries plc v Dickman* reported in; [1990] 1 All ER 568 where the House of Lords held for a duty of are to exist.

(a) the damage is reasonably foreseeable;

(b) there is a close and direct proximity between the plaintiff and the third defendant; and

(c) the circumstances as a whole must be such that is fair, just and reasonable for the imposition of a duty of care.

I find on the facts all the ingredients set out above have been fulfilled evidentially.

[36] All parties were aware of the inherent risk of fire breaking out in the pit and the third defendant should have ensured the plaintiff be so protected or prevented from entering the pit area. I reject the argument that it has not been established that even if with the fire resistant suit, the plaintiff would not have suffered damages. For all these reasons, I rule the plaintiff have made out a case against the third defendant for breach of duty and negligence.

THE PLAINTIFF'S CLAIM AGAINST THE FOURTH DEFENDANT

[37] After due deliberation of the submissions of counsel of the fourth

defendant and counsel for the plaintiff on the point, I am convinced that the fourth defendant had breached its duty of care that it owed to the plaintiff as an invitee. From the video, it was clear that the presence of fire Marshalls was conspicuously absent. When the fire broke out in the pit, there was pandemonium causing the plaintiff to be hurt. Further, if the race stewarts had been diligent they should have prevented the plaintiff from being present in the pit area without a fire resistant suit and the plaintiff should have been ejected from the pit. However, he continued to remain there during oil refueling. The pit area is occupied by the team, but the overall occupier remains the fourth defendant, see *Takong Tabari v Government of Sarawak & Ors* reported in [1996] 5 MLJ 435, and the case of *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283 a decision of the Federal Court where it was held:

> 2. The appellants did not cease to be in possession of the site and continued to be the occupier of the site. The erection and existence of the *kongsi*-house were for the common benefit of the appellants, the contractors and the labourers. The appellants had a duty to ensure that the contractors complied with their obligations and in particular to ensure that the kongsi-house was safe for the workers to live in.

[38] In assessing the reasonableness of the fourth defendant's conduct, reasonable foreseeability of damage to the plaintiff must also be considered. I find the injuries suffered by the plaintiff were foreseeable and the fourth defendant failed to exercise a proportionate degree of care to avoid injuries to the plaintiff. The probability of the plaintiff suffering burns in the event of a fire breaking out in the pit was real and lack of precautionary measures to prevent the same renders the plaintiff's claim actionable. See the case of *Susan Cheah Pik Yee & Ors v Mayban Finance Bhd* reported in [2003] 3 MLJ 376. The cost of precautionary measures to be put in place by the fourth defendant could have been implemented without the fourth defendant incurring astronomical costs. See the decision of the Federal Court of *Hamzah D494 & Ors v Wan Hanafi bin Wan Ali* reported in; [1975] 1 MLJ 203. The importance of the fourth defendant's actions to reduce the risks of injury in what is already a high risk sport cannot be under stated. Whilst Motorsport is high risk, in nature, the injury to the plaintiff could have been avoided if the plaintiff had been excluded from the pit area without a fire resistant suit. See *Aikbee Sawmill Ltd v Mun Kum Chow* [1971] 1 MLJ 81. I also hold that whilst the pit area remains the domain of each team, the overall occupier of the circuit is the fourth defendant and remains liable to the plaintiff. I refer to the case of *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors* reported in [1981] 2 MLJ 27 a decision of the Federal Court at p 28 where it was held that:

> In conclusion we are of the opinion that having regards to what we have discussed above, the respondents were therefore negligent for failing to take all reasonable and proper steps to prevent the appellant under their care from sustaining the injury.

[39] Applying the *Caparo* test that I alluded to earlier, I am of the view that it was just fair and reasonable to impose a duty of care to the plaintiff by the fourth defendant and on the facts the same had been breached. From a viewing of the video of the incident shown at the trial of this matter, I find a clear absence of fire marshalls and race stewarts at time of the incident. It was submitted that the fire was brought under control within a few seconds but that is of little comfort to the plaintiff who is now scarred for life. The video clearly shows pandominium when the incident took place and the plaintiff's presence in the pit area seem, to have been undetected. Had the officials of the fourth defendant been more alert to the inherent risks of the plaintiff's presence in the pit area during oil refueling this could have been avoided the high standards of safety must be consistently maintained in all races organised by the fourth defendant.

THE PLAINTIFF'S CLAIMS AGAINST THE FIFTH DEFENDANT

[40] Turning to the fifth defendant, it is the view of this court the fifth defendant owes a duty of care to the plaintiff to ensure the MMER race are safe to be run before a license is issued for the running of the race. The evidence shows that scrutineers of the fifth defendant had inspected the track and in fact an official of FIA had also inspected the track and evaluated the safety of the same. In my Judgment the fifth defendant had done all that was required of them to ensure a safe race track. I refer to the unreported decision of *Wattleworth v Goodwood Road Racing Company Ltd and others* [2004] All ER (D) 51 (Feb) I set out digest of facts and to the judgment of Davis J which I now quote:

> The first defendant owed a duty of care to users of the track, including the deceased, under the 1957 Act. However the first defendant had taken a reasonable amount of care in all the circumstances of the case to see that the deceased would have been reasonably safe, so there had not been a breach of that duty. The second defendant, but not the third, had owed a duty of care in tort to track users but it any event there had not been a breach of that duty. Accordingly the claim would be dismissed.

And I also quote the judgment of Davis J.

> [39] It is plain that the MSA is capable of being (as it is) involved in all levels of motor racing, ranging from Formula 1 to club events such as sprints, kart racing and the like. Its responsibilities include central administration, training of MSA licensed officials and promotion. It also has a licensing function in relation to venues where races or various other events are to be held. Such events at such venues require not only an MSA track licence: they also require an organising (or event) permit from the MSA. The Track licence itself will not be issued without the appropriate report from the MSA approved inspector. It follows that, as was the case at Goodwood, the operator had to comply with the MSA's requirements if it was to get the licence. As to the organising permit for a particular event, it will only be issued if the circuit is thought to be fit to stage the race; and the permit

will specify safety conditions for the event, including provision of marshals, ambulances and safety equipment. A steward is there on the day to ensure compliance with the requirements. The Track licence itself, it might be added, is not necessarily of general application: it is restricted to the type (or types) of event specified to be run at the particular circuit and there are boxes on the standard form of licence which are completed to designate them.

Duty of Care

[94] I turn then to the principal issues in this case. The first is the issue as to whether the defendants owed a duty of care to Mr Wattleworth. The position here is that Goodwood's primary defence (as advanced by Mr Anthony Barker QC appearing, with Mr Duthie, for Goodwood) is that, while it accepts that it owed such a duty, it discharged such duty as it owed by following scrupulously the advice and recommendations of the MSA and/or the FIA with regard to track safety matters. The position of the MSA and the FIA is that they did not, in the circumstances, owe any duty of care to Mr Wattleworth. If all these defences are right, then — even if there were negligence in the choice of this particular lorry tyre wall facing the earth bank at the Lavant corner — no one would have any liability for it. Not an appealing result.

[95] In my view, however, that is not a conclusion which I am compelled to reach or should reach, on the evidence which I have received.

[108] Mr Eklund for the MSA and Mr Fenwick QC (who, with Mr Popat, appeared for the FIA) referred me to a number of authorities in this context, including, among others, the all too familiar *Donoghue v Stevenson* [1932] AC 562 and *Hedley Byrne & Co Ltd v Heller* [1964] AC 465; [1963] 2 All ER 575. Mr Fenwick, in particular, stressed the well known statement of Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 2 AC 605; [1990] 1 All ER 568 at p 617:

> What emerges is that, in addition to foreseeability of damage necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the law considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

That case, of course, was one involving economic loss, not personal injury.

[109] Rather closer to the present case (albeit with differences on the facts) are the cases of *Perrett v Collins* [1998] 2 Lloyd's Rep 255 and *Watson v British Boxing Board of Control* [2001] QB 1134; [2001] 1 WLR 1256, both being decisions of the Court of Appeal.

[110] In *Perrett*, Mr Collins was a member of the Popular Flying Association. Under the regulatory scheme contained in the Civil Aviation Act 1982 the Association's inspector was required to inspect and approve an aircraft,

A constructed by Mr Collins from a kit, before a certificate of airworthiness could be obtained. The owner (Mr Collins) had, as the inspector appreciated, installed a gearbox different to that supplied by the manufacturer. In due course, the inspector certified the aircraft as fit to fly. Shortly thereafter the aircraft crashed and the claimant (Mr Collin's passenger) was injured. It was alleged, among other things, that the B inspector and the Popular Flying Association were negligent in that the aircraft did not have a propeller matching the gearbox fitted to the engine (of which gearbox the inspector was aware). They denied that they owed a duty of care to the claimant, and that matter was dealt with as a preliminary issue. It was held, upholding the decision at first instance, that C a duty of care was owed. It was held that it was foreseeable that if the inspector and the Association granted a certificate of fitness to fly in respect of this aircraft with an inappropriate gearbox there was likely to be an accident and they ought reasonably to have had in contemplation a person travelling as a passenger as being so affected when they were directing their minds to the relevant acts or omissions. D

And at p 262 he said this:

Where the plaintiff belongs to a class which either is or ought to be within the contemplation of the defendant and the defendant by reason of his involvement in an E activity which gives him a measure of control over and responsibility for a situation which, if dangerous, will be liable to injure the plaintiff, the defendant is liable if as a result of his unreasonable lack of care he causes a situation to exist which does in fact cause the plaintiff injury.

Once this proximity exists, it ceases to be material what form the unreasonable conduct F takes. The distinction between negligent misstatement and other forms of conduct ceases to be legally relevant, although it may have a factual relevance to foresight or causation. Thus a person may be liable for directing someone into a dangerous location (eg the Hillsborough cases; eg *Sharpe v Avery* [1938] 4 All ER 85) or a producer may be liable for the absence of an adequate warning on the labelling of his product (eg *Heaven v Pender* (1883) 11 QBD 503 at p 517, per Cotton LJ). Once the defendant has G become involved in the activity which gives rise to the risk, he comes under the duty to act reasonably in all respects reLavant to that risk. Similarly none of the particular difficulties which arise in relation to economic loss arise in relation to the causing of personal injury. Once proximity is established by reference to the test which I have identified, none of the more sophisticated criteria which have to be used in relation to H allegations of liability for mere economic loss need to be applied in relation to personal injury, nor have they been in the decided cases.

[127] It is appropriate to test this conclusion against a schematic application of Lord Bridge's so-called 'tri-partite test'. I bear in mind Hobhouse LJ's warning: I particularly relevant, I would think, where there has, as here, been an assumption of responsibility. But it is, I think, also of note that the judgment of Swinton Thomas LJ in *Perrett* followed Lord Bridge's approach; and that approach also featured in *Watson*. Doing that, I see no reason to depart from this conclusion. Rather it, to my mind, confirms it. The test of foreseeability is plainly satisfied; indeed the fact that the claimant's claim here is for foreseeable physical injury in my view is (as it was in *Perrett*)

of itself a 'potent factor' pointing to the existence of a duty. The test of proximity is in the circumstances also, I consider, satisfied. Nor, given the circumstances and notwithstanding all the points advanced by Mr Eklund, do I see anything unfair, unjust or unreasonable in imposing a duty of care on the MSA. In this context considerations of safety are of paramount importance (and were rightly so regarded by Goodwood, the MSA and the FIA). A conclusion which encourages the acceptance of responsibility and liability by those choosing to involve themselves in safety considerations is surely, all other things being equal, desirable. As Swinton Thomas LJ said in *Stratton v Hughes* (17 March 1998, unreported):

Those who organise and control sports such as these must take reasonable care in relation to the layout and the organisation …

That was said in the context of a case where the defendant included not only the owner and occupier of a race circuit but also the MSA (the event in question being, it should be added, an MSA event).

THE ISSUE OF *VOLENTI NON FIT INJURIA*

[41] I make reference to the text *Law of Torts in Malaysia* (3rd Ed), Norchaya Talib p 215 and I quote:

This is a Latin maxim which means the Plaintiff has consented or voluntarily assumed the risk of injury. In *Lee Geok Theng v Ngee Tai Hoo & Anor*, the principles on which volenti non fit injuria applied were explained thus:

Volenti non fit injuria simply means that to which a man consents cannot be considered an injury. No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it. No one can enforce a right which he has voluntarily waived or abandoned. Consent must be real and given without force, fear or fraud. Mere knowledge of a risk does not amount to consent

The learned judge further stated that when raising the defence, the Defendant must plead:

(i) that the facts of which the Plaintiff was fully appraised, gave rise to the injury; and

(ii) that the Plaintiff voluntarily undertook to be responsible for the risk.

[42] In our present case, there has been no evidence led to show the plaintiff had willingly consented to accepting the danger and or risks involved by being present in the pit. Consent must be real and given without force. The plaintiff may have had knowledge of the risk but that does not amount to consent.

See also *Wattleworth v Goodwood Road Racing Company Ltd and others* [2004] All ER (D) 51 (Feb) and I quote at p 52:

Other matters

> [174] A defence of volenti was raised. I would have rejected it. Of course Mr Wattleworth must be taken to have consented to the risks inherently involved in motor car racing, and I am sure that he did so. But that would have been on the basis that due steps would have been taken to see that the circuit (including the crash barriers) was reasonably safe and that those responsible for circuit safety — whoever they may be — would have taken reasonable care to provide appropriate barriers.

So I accordingly rejected the defence of *volenti non fit injuria*.

RES IPSA LOQUITUR

[43] In order to discharge the burden of proof, the plaintiff must prove that the defendant has acted in a particular way or that he has omitted to do something; but this requirement is not absolute. The judge may nonetheless conclude that the defendant has been negligent without hearing the facts of the case in greater detail, such as if a needle has been left in a child's stomach after an operation, there arises a presumption that the surgeon has been negligent. If the defendant is unable to explain the incident or tender any evidence to the contrary, this means the plaintiff has successfully discharged the burden of proof. This however, does not necessarily give rise to an automatic liability on the part of the defendant, as he has a right to rebut the presumption and give evidence and further proof that his act or omission was reasonable in the circumstances.

[44] When the plaintiff raises the maxim *res ipsa loquitur*, he is asserting that based on the evidence tendered, he has proven prima facie, that the defendant is negligent. *Res ipsa loquitur* means 'the thing speaks for itself' and the maxim must be expressly raised. The main purpose of the maxim is to avoid injustice to the plaintiff as otherwise the plaintiff would be required to prove the details of the cause of the accident, which he may not know.

[45] The plaintiff has raised the issue of *res ipsa loquitur* and has submitted that the court should invoke this doctrine in favor of the plaintiff. The words mean 'the thing speaks for itself. As stated by Justice NH Chan JCA in the case of *Teoh Guat Looi v Ng Hong Guan* reported in[1998] 4 MLJ 525 at p 529; [1998] 4 AMR 3815 at pp 3821 and I quote:

> … *res ipsa loquitur* was in essence no more than a common sense approach to the effect of the evidence in certain circumstances. It means that a plaintiff prima facie establishes negligence where (i) it is not possible for him to prove precisely how the accident happened, but (ii) on the evidence as it stands, he manages to show that the accident could not have happened without negligence on the part of the defendant.

[46] Here it is clear that the accident was caused by the hose attached to the refueling dump was short which caused it to give way when refueling leading to

the fire in the pit. The court therefore finds the doctrine of *res ipsa loquitur* has no bearing in this case and I reject the same.

THE ISSUE OF CONTRIBUTORY NEGLIGENCE

[47] The gist of a plea of contributory negligence is the unreasonable behavior of the plaintiff with regard to his own safety which results in foreseeable damage to himself (see *Foong Nan v Sagadevan* [1971] 2 MLJ 24). The damage that occurs must be caused or contributed by the plaintiff and would not have occurred if not for the plaintiff's conduct. The focus is on the cause of the damage and not the accident.

[48] From the evidence, the plaintiff was not prohibited from being in the pit area. The plaintiff was a tyre changer and would have needed to be in the pit area. The protection of a fire resistant suit was not mandated by the existing regulations at that time and the plaintiff presence was unnoticed but no action was taken to remove him from the pit area. How could the plaintiff have known that the nozzle was short that caused fuel spillage and the ensuing fire. In my view the plaintiff was not contributory negligent as his conduct was reasonable in the circumstances.

THE ISSUE OF DAMAGES

[49] I refer firstly to the claim for general damages ie for pain and suffering as a consequence at the plaintiff's injury found in para 22 of statement of claim p 14 bundle A and the medical report in question at pp 19–20 of bundle 3 and I set out the report in full.

> Pemeriksaan Fizikal (Physical Examination (including general assessment, Eye, ENT, Oral Cavity, Respiratory system, Cardiovascular system Abdomen, Genitourinary, Central Nervous System, Musculoskeletal, Mental Heats, Status & Others)
>
> - Upon arrival patient was intubated and sedated. On examination, he sustained 56% mixed thickness (partial and full thickness) burns to his face, neck, trunk and all 4 limbs (Lund & Borwder Chart for Adults). An emergency escharotomy procedure of both upper limbs was performed in the Burns Unit by the PRS Specialist (right medial forearm escharotomy, left medial & lateral forearm escharotomy). Collagen sheet dressing was applied to his face & neck burns.
>
> Keputusan Ujian Makmal & Radiology (Summry of Investigation)
>
> Relevant investigations:
>
> - Serial chest X-Rays (CXR): pneumonic changes in keeping with an inhalation injury => subsequently improved to a clear CXR with normal

respiratory findings. Multiple blood, tissue & wound swab Culture & Sensitivities, to aid antimicrobial therapy.

Diagnosis Muktamat (Final Diagnosis)

- 56% thermal petrol flame burn injury with associated inhalational injury.

Rawatan (Treatment)

- Rumusan prosedur yang dijalankan ke atas pesakit (Summary of procedure carried out on patient):

8/8/2010

- Escharotomy Right lateral forearm (PH)
- Escharotomy Right medial and Left forearm
- Collegen application to face & beck

9/9/2012

- Escharotomy both legs
- Collagen application to neck

12/8/2010

- Wound debridement (WD)

16/8/2010

- WD
- Left chest tube inserted

18/8/2010

- Extubated at 7.55am

22/8/2010

- Re-intubated at 1.45am

21/8/2010

- Chest tube removed

26/8/2010

- WD

28/8/2010

- Extubated at 12 mid-day

2/9/2010

- MEEK micrograting

12/10/2010

- Split-skin grafting (SSG) and ReCell spray

Preskripsi ubat-ubat yang diberikan kepada pesakit (Drug & other medicaments prescribed to patient):

- Completed courses of relevant antibiotics based on wound Culture & Sensitivities. Regular dressings were used throughout the inpatient stay.

Perkembangan keadaan pesakit sepanjang di bawah penjagaan doktor termasuk rawatan susulan (Progress of patient while under the care of doctor including follow up):

- The patient has continuing follow-up appointments with the PRS team, physiotherapist & occupational therapists.

Keadaan Pesakit ketika kali terakhir berjumpa doktor (Condition of the patient last seen by the doctor):

- He was last seen by me in the Outpatient PRS Clinic. There were small patches of residual raw areas. Otherwise the wound were epithelialised and he is undergoing physiotherapy as an outpatient.

[50] I refer also to the evidence of PW2 Dr Farrah Hani Imran and to the evidence of the plaintiff himself. The plaintiff suffered extensive burns and clearly the plaintiff would have been in agonising pain during the whole process of treatment. As PW2 testified live with these burns for the rest of your life. The plaintiff also testified one of the most painful experiences was the change of dressing. It is as if your whole skin is being torn off. I can do no better them to quote the plaintiff in his evidence and I quote:

Q: There is one more question that I would like to ask you since Dr. Farrah have raised the issue on dressings and the pain. Now, the pain and suffering that you have suffered, can you please describe to the Court, in terms of the dressings and the pain that you have to go through during the treatment? Can you just at least elaborate a bit?

A: As a burnt patient, in order to … medical team who are in charge of burnt patients, they have to find a balance between keeping the wounds clean as well as changing the dressing very often. And also to allow the wounds to heal, so they can't change it too often. So they have to find a balance. For me, it was every two days I would have to have my dressings changed. It is hard to quantify or put the pain into words but it would be akin to having your skin ripped off. It was not a very pleasant feeling.

[51] I also took into account the evidence of PW2 in her statement to court. Observing the plaintiff in court the plaintiff will never be the same again when in the witness box the scars on his face were clearly visible and he had to ward of insects like mosquitos that were attracted to the raw skin. Its akin to a soul in a charred body as the wounds are extensive on his person as well. I also find that an award for damages for pain and suffering should take into account residual disability and follow up surgery. Having reviewed the authorities particularly (see *Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor* [1995] 4

MLJ 182, and see *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor* [1988] 1 MLJ 19 and the unreported decision of *Moo Ah Kow v TNB Distrubition Sdn Bhd* (KLHC S7–22–1440 of 2003), taking into account the length of time of the cases being decided before the present case, I am guided by the dictum of His Lordship Abdul Malik Ishak J as he then was in the case of *Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor* [1995] 4 MLJ 182 and I quote:

> By comparison, from the medical report reproduced in the early part of this judgment, the plaintiff here sustained extensive burns as a result of the electrical explosion on his face, both arms and hands and it went down to the lower limbs. RM80,000 to the plaintiff now is mere pittance bearing in mind the inflationary rate and the ever weakening ringgit in Johor Bahru. It is common knowledge that the cost of living in Johore Bahru is even higher than that of Kuala Lumpur. On this point, I need to refer to *Phuah Jee Suan v Nila Vasu Pillai* [1973] 1 MLJ 186 at p 188 (CA) where Choor Singh J had this to say:
>
> > The other matter which requires consideration is the question of changes in the value of money which has been often termed as the decrease in the purchasing power of the dollar or the increase in the cost of living over the years. Leaving authority aside, both principle and common sense require that the court, when they assess an award of money, which is to compensate a plaintiff for the damage caused to him by his injuries, should take into account large and comparatively permanent changes in the real value, ie in the purchasing power of money. If one tries to assess an award of personal injuries today, and looks for guidance to an award made 20 years ago in a comparable case, the decline in the real value of money must be taken into account … It is therefore imperative that where an old comparable case is considered, there should be an adjustment for the change in the value of money which should be reflected in the award.
>
> That was a case decided in Singapore in 1973. In 1975, that case was considered favourably in Malaysia by Yusoff J in *Wong Tin Vui v Patrick Midok & Anor* [1975] 2 MLJ 260. In my judgment, a fall in the value of money must be taken into account when one attempts to obtain guidance from a comparable of yesteryear, so that the award which is eventually given is reflective of the current value of the money. This must be the correct approach to adopt. The defendant tortfeasor must also expect that an award would be reflective of the current value of money — this is a reasonable foreseeable deduction and would not be bad for remoteness (see *'The Wagon Mound'; Overseas Trading (UK) v Morts Dock and Engineering Co* [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126). In my judgment, the plaintiff must have suffered tremendously from the severe burns which rendered him unconscious for 18 solid days unlike the first respondent in *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor*. There was evidence adduced that the plaintiff walked out of the switch gear room after that loud explosion in a stupor with his whole body aflame. Rosli managed to douse that flame otherwise the plaintiff may have succumbed to his injuries just like Ridzuan. A fair and reasonable award for pain and suffering would, in the circumstances, be RM120,000.

I therefore find the plaintiff would be entitled to:

(a) general damages — RM175,000;

(b) special damages that the court finds the plaintiff has proved — RM47,398;

(i) medical bills for hospitalisation at HUKM — RM11,583;

(ii) medical, extra nourishing food and surgical items — RM13,545.90;

(iii) petrol, toll and parking — RM1,339.80;

(iv) medical items without bills — RM627.30;

(v) maid/helper — RM14,000

(vi) personal effects — RM6,302; and

(c) grand total — RM222,398.

LIABILITY

[52] The court apportions liability for damages in the ratio of 40% to the fourth defendant and 60% to the third defendant. Costs fixed at RM20,000 each to be paid by the third and fourth defendants to the plaintiff. I award interest at 4% from date of filing to date of judgment on general damages and thereafter 4%pa from date of judgment to date of realisation. I also award interest at 4% from 10 August 2010 to date of judgment on special damages and thereafter 4%pa from date of judgment to date of realisation.

Claim allowed in part.

Reported by Afiq Mohamad Noor